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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1998

NICOLE'S, INC. and ELLIOT COOK,

Petitioners,

vs.

PYRAMID TECHNOLOGY CORPORATION, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. By affirming a summary judgment order against Nicole on a joint venture/partnership claim which Nicole never even alleged, did the Ninth Circuit violate Nicole's due process and jury trial rights?

2. By then refusing to allow petitioner Nicole to amend its counterclaim to clarify that it was alleging a contract claim against respondent Pyramid, did the Ninth Circuit again violate Nicole's due process and jury trial rights?

3. Should certiorari be granted to resolve the conflict among the Circuits on granting such leave to amend pleadings?

PARTIES TO THE PROCEEDINGS IN THE COURTS BELOW

Petitioner Nicole's, Inc. is a close corporation which is wholly owned by petitioner Elliot Cook, an individual. Upon information and belief, respondent Pyramid Technology Corporation, Inc. is a Delaware corporation currently known as Pyramid Technology Corporation, and is wholly or primarily owned by Siemens, A.G., a German corporation.

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IN THE
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PYRAMID TECHNOLOGY CORPORATION, INC.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Nicole's, Inc. and Elliot Cook (collectively, "Nicole") respectfully petition for a writ of certiorari to review the order of the United States Court of Appeals for the Ninth Circuit affirming the summary judgment below, and also the Ninth Circuit's subsequent order denying Nicole's petition for rehearing on September 3, 1998.

OPINIONS BELOW

The district court's orders granting summary judgment against Nicole and denying Nicole leave to amend are attached as Appendices "A" and "B"; and the Ninth Circuit's decision affirming the summary judgment, and its subsequent order denying Nicole's petition for rehearing, are attached respectively as Appendices "C" and "D". None of these rulings is reported.

JURISDICTION

The Ninth Circuit entered its order denying Nicole's petition for rehearing on September 3, 1998. This Court has jurisdiction to review that order by writ of certiorari under 28 U.S.C. §1254(1). Certiorari could also be properly granted under Supreme Court Rule 10(a), since the Ninth Circuit's ruling is "a decision in conflict with the decision of another United States Court of Appeals on the same important matter," and "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power . . . ."

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:
"Congress shall make no law . . . abridging the freedom of speech, . . . or the right of the people . . . to petition the Government for a redress of grievances."
U.S. Const., 1st Am.

The Fifth Amendment to the United States Constitution provides in relevant part:
"No person shall . . . be deprived of life, liberty, or property without due process of law. . . ."
U.S. Const., 5th Am.

Rule 15(a) of the Federal Rules of Civil Procedure provides in relevant part:
"[A] party may amend the party's pleading only by leave of court or by written consent of the adverse party; and leave shall be freely granted when justice so requires."

STATEMENT OF THE CASE

Introduction

This petition questions the constitutionality of the Ninth Circuit's affirmance of a summary judgment order which had been entered by the trial court without a hearing. The primary issue in this petition is whether the district court and the Ninth Circuit should have allowed petitioner Nicole to amend its counterclaim under Fed.R.Civ.P. 15(a) to allege a claim for breach of contract, since the Ninth Circuit's ruling specifically noted that Nicole has evidence sufficient to support such a claim. Appendix "C" at pp. 14a-15a.

As detailed below, the district court granted summary judgment on a "joint venture" (or partnership) claim which Nicole never even alleged. Appendix "A" at pp. 3a-6a. Then, when Nicole sought leave to amend to clarify that it was suing on a breach of contract claim, the district court denied leave to amend (Appendix "B" at p. 10a), and was affirmed by the Ninth Circuit. Appendix "C" at p. 14a.

Nicole was prejudiced by these repeated rulings denying its motions to amend -- as verified by the Ninth Circuit's ruling that Nicole's evidence "shows, if anything, the possibility of an oral contract." *Id.* at pp.14a-15a (emphasis added).

By affirming the district court's summary judgment order on the wrong cause of action, without allowing Nicole to amend its counterclaim even once, the Ninth Circuit's ruling directly conflicts with existing opinions by other courts of appeals. *E.g.*, *Bank v. Pitt*, 928 F.2d 1108 (11th Cir. 1991):

> "Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice."

928 F.2d at 1112 (emphasis added). *Accord, United States v. Vorachek*, 563 F.2d 884, 886 (8th Cir. 1977) (allowing complaint to be amended after summary judgment was entered); *In re Beef Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1980), *cert. denied*, 449 U.S. 905 (1980) (policy allowing pleadings to be amended is strongest on first motion to amend).

There is no question in this case whether an amended counterclaim "might" state a claim for breach of contract, since the Ninth Circuit's own ruling notes that the evidence "shows, if anything, the possibility of an oral contract." Appendix "C" at pp. 14a-15a. Thus, certiorari is necessary in this case -- not just to protect petitioner Nicole's constitutional rights, but also to resolve this conflict over the application of Fed.R.Civ.P. 15(a), since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals . . . concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 744, 347 (1995). *See* Supreme Court Rule 10(a).

Summary of Argument

The central issue in this case is petitioner Nicole's attempt to sue respondent Pyramid for breaching its promise "to use its best efforts to provide current versions of certain software applications required by the law firm market (such as WordPerfect)." Cook Decl. ¶3 (ER 69); Harvan Decl. ¶4 (ER 143). *See* ER 41 (Nicole's original counterclaim); ER 148 (Nicole's proposed amended counterclaim).[1/]

Nicole was unable to try this claim to the jury because the trial court granted summary judgment on Nicole's first cause of action, "primarily because essential elements of a joint venture are totally

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[1/] Citations to "ER" are to the Excerpts of Record filed with the Ninth Circuit in this matter, and are cited pursuant to Supreme Court Rule 12.7.

missing" (Appendix "A" at p. 6a) -- and the Ninth Circuit affirmed for lack of "sufficient evidence to show a genuine issue for trial as to whether Pyramid and Nicole had a joint venture agreement." Appendix "C" at p. 14a.

But the Ninth Circuit's order acknowledges that Nicole's evidence "shows, if anything, the possibility of an oral contract." *Id.* at pp. 14a-15a. And Nicole did everything it could to repeatedly try to amend its counterclaim to clarify and re-allege a breach of contract claim, rather than a claim for breach of a joint venture, which Nicole never alleged.

For example, in Nicole's original opposition to Pyramid's summary judgment motion, Nicole "ask[ed] leave to amend . . . its counterclaim to clarify that it is suing on the oral contract between the parties" (ER 66-67). Nicole then formally moved to amend its counterclaim, to clarify that it was alleging a contract claim instead of a joint venture claim (ER 118-20). *Accord,* ER 147-56 (copy of proposed amended counterclaim).

This issue was fully briefed on appeal. *See* Nicole's Opening Brief on Appeal at pp. 16-18; Nicole's Reply Brief on Appeal at pp. 18-21. The Ninth Circuit should therefore have reversed the summary judgment and allowed Nicole at least one opportunity to amend its counterclaim to clarify that it was suing for breach of contract, since "amendments under Rule 15 are favored to facilitate decision on the merits." *Ferris v. Santa Clara,* 891 F.2d 715, 718 (9th Cir. 1989). *Accord, Foman v. Davis*, 371 U.S. 178, 182 (1962).[2/]

[2/] *See also Limandri v. Judkins,* 52 Cal.App.4th 326, 339 (1997) ("the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief").

By affirming the trial court's refusal to grant Nicole leave to amend its counterclaim even once to re-allege a contract claim -- despite Nicole's evidence which "shows, if anything, the possibility of an oral contract" (Memorandum Order dated July 27, 1998, at p. 2 -- Appendix "C" at pp. 14a-15a) -- the Ninth Circuit adopted a rule which is squarely in conflict with other circuits' holdings that "[i]f the under-lying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits . . . ." *Vorachek, supra,* 563 F.2d at 886 (8th Cir.; allowing complaint to be amended after summary judgment was entered).

Indeed, "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." *Bank, supra,* 928 F.2d at 1112 (11th Cir.; ordering trial court to grant leave to amend). *See also In re Beef Indus. Antitrust Litigation, supra,* 600 F.2d 1148 (5th Cir.; policy allowing amendments is strongest on first motion to amend).

Moreover, this case shows why it is wrong as a matter of policy to refuse to allow a claimant to amend its pleadings at least once, if "a more carefully drafted complaint might state a claim." 928 F.2d at 1112. Although Pyramid's summary judgment motion denied making any promises to Nicole (ER 52-53), Pyramid conceded at trial and after summary judgment was entered that "both [Pyramid's regional manager Jack] Harvan and [Harvan's supervisor Hugh] Flannery said, 'we're going to make our best effort to get software that's useful and competitive'" (ER 252; emphasis added). *Accord,* ER 254 ("we'll use our best efforts to get you up-to-date, to have the software to get you up-to-date").

Nicole was substantially prejudiced by the Ninth Circuit's refusal to allow it to allege a contract claim, since that claim never

went to the jury despite Pyramid's subsequent admissions that it actually made the contractual promises alleged in Nicole's counterclaim. The Ninth Circuit's ruling violated Nicole's constitutional rights of petition and due process, and has also created a conflict among Circuits -- which harm can only be remedied by granting certiorari.

The Underlying Litigation

Statement of Facts[3/]

This is a dispute between computer manufacturer Pyramid and its computer systems integrator Nicole. Pyramid makes computers, and before going out of business, Nicole integrated computer systems, *i.e.*, it assembled hardware and software to create computer systems to meet its customers' individual needs. In the summer of 1987, Nicole through its managing director Cook and Pyramid through its regional sales manager Jack Harvan began negotiating an arrangement for Nicole to market Pyramid computer products to large law firms. Cook Decl. ¶2 (ER68); Harvan Decl. ¶3 (ER143).

As a result of these negotiations, Nicole through Cook and Pyramid through Harvan agreed to market standardized computer software applications to large law firms (the "Marketing Agreement"). Under the Marketing Agreement, Pyramid agreed to use its best efforts to provide current versions of certain software applications required by the law firm market (such as WordPerfect) in a form that would be compatible with and run on the "Pyramid Technologies", *i.e.*, Pyramid's computers and operating systems; and also to give Nicole

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3/ Because the Statement of Facts relates primarily to Nicole's appeal from the summary judgment order against its counterclaim, it is based primarily on Nicole's evidence submitted in opposition to Pyramid's summary judgment motion.

sales rights for the Pyramid Technologies in the new market on a most-favored-nation basis. Cook Decl. ¶3 (ER69); Harvan Decl. ¶4 (ER143).

In exchange, Nicole agreed to devote its energies toward developing a market for the Pyramid Technologies among large law firms. Once the Marketing Agreement was reached, it was confirmed in a three-way telephone conference in the fall of 1987 between Cook, Harvan, and Harvan's supervisor at Pyramid, Hugh Flannery. Cook Decl. ¶3 (ER 69); Harvan Decl. ¶4 (ER 143).

Although Pyramid's summary judgment motion denied making these promises, Pyramid admitted after cross-examination at trial that Harvan "told Cook before they signed the V.A.R. Agreement that Pyramid would use its best effort to get up-to-date software. . . . There's no question Harvan said those things" (ER 257-58) (emphasis added). *Accord*, ER 252 ("during those early discussions in '87, both Harvan and Flannery said, 'we're going to make our best effort to get software that's useful and competitive'"); ER 254 ("We'll use our best efforts to get you up-to-date, to have the software to get you up-to-date").[4/]

Based on the Marketing Agreement, Nicole spent the next three years using most of its time, effort and funds developing a market among large law firms for the Pyramid Technologies. Nicole also devoted substantial time and employee resources acquiring the required Pyramid-specific technical skills to sell and support the

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4/ Cook dealt with Harvan because when Cook contacted Pyramid's corporate headquarters, he was told to deal with Harvan as Pyramid's regional sales manager for the geographical region which included Nicole's headquarters in Philadelphia. Cook Decl. ¶2 (ER 68-69). Indeed, during the telephone conference which confirmed the Marketing Agreement, Harvan's boss Flannery specifically told Cook that Harvan was authorized to enter the deal on behalf of Pyramid. *Id.* at ¶5 (ER 69); Harvan Decl. ¶6 (ER 144).

Pyramid Technologies effectively (including sending its employees to classes at Pyramid's headquarters). Nicole would not have invested its time and resources, if Nicole had not relied on Pyramid's promise to use its best efforts to ensure the availability of the law firm software applications for the Pyramid Technologies under the Marketing Agreement. Cook Decl. ¶6 (ER 70).

In fact, Nicole successfully established the agreed market, and actually sold or entered serious negotiations to sell millions of dollars of the Pyramid Technologies to several prominent East Coast law firms, including the Dilworth, Paxson and Saul, Ewing law firms in Philadelphia. If Pyramid had delivered the computer software applications which it promised, Nicole would have made substantial profits selling the Pyramid Technologies to those firms. For instance, on the Saul, Ewing sale alone, after full payment to Pyramid, Nicole would have made over $275,000 in additional profits on the entire projected sale had it not been truncated for lack of product to sell. Cook Decl. ¶7 (ER 70); Harvan Decl. ¶8 (ER 145).

Unfortunately, despite its admitted promise to do so, Pyramid never used its best efforts to develop the promised software applications. *Id.* Indeed, Pyramid did not even bother to obtain a license agreement with WordPerfect until three years after its 1987 agreement with Nicole, because (in Pyramid's own words) prior to 1990 Pyramid believed "there was not sufficient market justification for Pyramid to [obtain] a license with WordPerfect" (ER 55-56). Of course, whether or not there was "sufficient market justification" had no impact on Pyramid's contractual obligations under the Marketing Agreement.[5/]

5/ The evidence showed that Pyramid could have obtained the WordPerfect license in 1988 because of Nicole's efforts, but Pyramid chose to walk away from the opportunity, and actually insulted the WordPerfect representatives. Cook Decl. ¶8 (ER 70-71); Harvan Decl. ¶9 (ER 145); *see also* Memo from Cook dated October 10, 1990 (ER 61-63).

Because Pyramid did not use its best efforts to provide the promised computer software applications to run on the Pyramid Technologies, Nicole was left without product to sell to its newly developed market. Pyramid's breach not only deprived Nicole of its legitimate profits under the Marketing Agreement, but actually put Nicole out of business because of Nicole's misplaced reliance on Pyramid's promises. Cook Decl. ¶¶8-9 (ER 70-71); Harvan Decl. ¶¶9-10 (ER 145).

Proceedings in the District Court

After Nicole applied its losses as a setoff against monies which it otherwise owed Pyramid, Pyramid filed this lawsuit in 1991 (ER 5). Nicole timely filed a counterclaim for breach of the Marketing Agreement and related claims (ER 32), which is the subject of this petition.

District Court Judge James Ware entered summary judgment against Nicole on its entire counterclaim in 1994 (Appendix "A" at pp. 2a-6a). Judge Ware then denied Nicole's motion to amend its counterclaim to clarify that it was suing for breach of contract (Appendix "B" at p. 10a), but later allowed Nicole to reinstate some other claims, including Nicole's fraud claim.

The trial on Pyramid's claims against Nicole, and on Nicole's fraud counterclaim against Pyramid, took place in February of 1996 (ER 706-08). On March 1, 1996, the jury returned a verdict against Nicole (ER 273-75), and the trial court entered final judgment on May 2, 1996 (ER 276-77).

Review By The Ninth Circuit

After the trial court denied Nicole's post-judgment motions, Nicole timely appealed. The Ninth Circuit affirmed the trial court's

summary judgment order on Nicole's counterclaim on July 27, 1998, primarily on the old grounds that Nicole could not prove all the elements of a "joint venture" (a partnership) with Pyramid (Appendix "C" at p. 14a) -- which Nicole never alleged in the first place.

However, the Ninth Circuit's order also acknowledged that Nicole's evidence "shows, if anything, the possibility of an oral contract." Appendix "C" at pp. 14a-15a. Since Nicole had specifically appealed the trial court's refusal to allow Nicole to amend its counterclaim to allege a contractual claim, Nicole immediately filed a petition for rehearing which focused on the issue of its requests for leave to amend its counterclaim. The Ninth Circuit denied Nicole's petition for rehearing on September 3, 1998. Appendix "D" at p. 22a.

REASONS FOR GRANTING THE WRIT

Certiorari should issue for any of three reasons:

First, by affirming the district court's summary judgment order on a claim which Nicole never even alleged, the Ninth Circuit violated Nicole's constitutional rights of due process and petition, which include its right of access to the courts to pursue litigation. *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513 (1972).

This Court has held that a party is only obligated to respond to a summary judgment motion by offering evidence to support the claims which are alleged in its pleadings. *First National Bank v. Cities Service Co.*, 391 U.S. 253, 290 (1969). It is therefore axiomatic that Nicole was unfairly denied the right to try its contract claim to the jury, since the Ninth Circuit addressed a different cause of action with different elements which Nicole had never even alleged.

Second, by refusing to give Nicole even one opportunity to amend its counterclaim to clarify that it was suing on a breach of contract claim, the Ninth Circuit again violated Nicole's constitutional rights of due process and petition, and also this Court's ruling that a summary judgment motion "must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986).

Indeed, Pyramid's belated trial admission that it did agree to "use our best efforts to get you up-to-date, to have the software to get you up-to-date" (ER 254) shows that Nicole was prejudiced by not being allowed to try its contract claim before the jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Third, certiorari should issue to resolve the conflict between Circuits as to whether a claimant should get at least one chance to amend its pleading, where it may be able to state a cause of action, and also to provide guidance on the propriety of amendments generally, since "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton, supra*, 500 U.S. at 347.

The Ninth Circuit Violated Nicole's Due Process and Petition Rights, By Conceding that Nicole's Evidence Supported a Claim for Breach of Contract But Refusing to Allow Nicole to Amend its Counterclaim to Clarify that it was Suing for Breach of Contract.

The only issue on a summary judgment motion is whether the disputed facts "could . . . lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 514, 587 (1986). As noted above, the Ninth Circuit reviewed the evidence in this case and concluded that it "shows, if

anything, the possibility of an oral contract." Appendix "C" at pp. 14a-15a. This fact alone shows that it was improper to affirm the trial court's summary judgment order, and to deny Nicole leave to amend its counterclaim to allege a breach of contract claim.

The bizarre aspect of this lawsuit is that Nicole's counterclaim actually specifically sued Pyramid for "Breach of Contract" (ER 41). Indeed, Pyramid admits that Nicole's cause of action was for "breach of contract" (Pyramid's Brief on Appeal at p. 17). Moreover, the Cook and Harvan declarations demonstrate that the two people who negotiated the contract at issue on behalf of Nicole and Pyramid both agree that the contract was in fact made. Cook Decl. ¶¶3-4 (ER 69); Harvan Decl. ¶¶4-5 (ER 143-44).

Since Nicole's original counterclaim sued for "Breach of Contract," and Pyramid admits that Nicole sued it for breach of contract, how could the district court have entered a summary judgment motion on a different claim which was never alleged, *i.e.*, the purported claim for breach of a "joint venture" (or partnership)? The only possible explanation is that Nicole's original counterclaim called the parties' contract by the shorthand term the "Joint Venture Agreement" (ER 41), just as it could have called it the "Contract," or the "Agreement," or any other name.

The district court seized on this shorthand term, and apparently never even read Nicole's pleading to see what claims were actually alleged, but instead granted summary judgment "primarily because essential elements of a joint venture are totally missing" (Appendix "A" at p. 6a) -- thereby dismissing a cause of action which was never even before the Court. Although the trial court did not find any disputed material facts, it was analyzing the wrong cause of action because Nicole did not allege any claim for "breach of joint venture." Nicole's Counterclaim, at p. 10 (ER 41).

The Ninth Circuit merely followed in the district court's footsteps by reviewing Nicole's evidence under a joint venture analysis and finding it wanting. Appendix "C" at p. 14a. This was clearly improper, because although Nicole's original counterclaim called its oral contract the "Joint Venture Agreement" (ER 41), Nicole specifically alleged a "contract" to market standardized computer software applications to law firms, and sued Pyramid for "Breach of Contract." *Id.*

In responding to a summary judgment motion, a party need only offer evidence to support the claims alleged in its pleadings. *First National Bank, supra,* 391 U.S. at 290. Thus, Nicole should not have been required to show evidence to support a joint venture cause of action which it never alleged, since its actual cause of action was clearly and unequivocally alleged as a "Breach of Contract" claim (ER 41). Nicole offered evidence to support that claim (ER 69-71); the Ninth Circuit acknowledged that the evidence "shows, if anything, the possibility of an oral contract" (Appendix "C" at pp. 14a-15a); and summary judgment was therefore improper. *Celotex Corp., supra,* 477 U.S. at 327.

Pyramid argued on appeal that merely "relabeling" this cause of action would not change the outcome. Pyramid's Brief on Appeal at p. 33. But it would, because a contract claim does not depend on the "essential elements of a joint venture," such as a right to joint control or an understanding to share profits or losses. *See* California Civil Code §1550 (listing elements of a contract). It is axiomatic that a contract claim should not be thrown out merely because "essential elements of a joint venture are totally missing" (Appendix "A" at p. 6a) -- despite the trial court's having done so in this case. *See Limandri, supra,* 52 Cal.App.4th at 339 ("the trial court is obligated to look past the form of a pleading to its substance. Erroneous or confusing labels by the inept pleader are to be ignored if the complaint pleads facts which would entitle the plaintiff to relief").

And in fact Nicole was severely prejudiced by losing its contract claim, because it was never allowed to try that claim to the jury. Although Nicole was eventually allowed to try its claim for fraud, the evidence needed to support a fraud claim is not only different but also more difficult than the evidence on a contract claim.[6/]

Depriving Nicole of its contract claim was therefore highly prejudicial, since a jury could have found that Pyramid lacked the necessary intent to defraud Nicole when it promised to use its best efforts, and yet still find Pyramid to have breached its promised obligation. This is an important distinction, because although Pyramid admitted that Pyramid did make the contractual promises -- "both Harvan and Flannery said, 'we're going to make our best effort to get software that's useful and competitive'" (ER 252) -- Pyramid's counsel also emphasized in his closing argument the necessity of an intent to defraud, as shown by Volume 13 of the trial transcript, which intent is not necessary to prove a contract claim.

Since Pyramid admitted at trial that it did commit to "use our best efforts to get you up-to-date, to have the software to get you up-to-date" (ER 254), Nicole should have been allowed to try its contract claim before the jury. Merely because the jury may not have believed Pyramid's promises to be fraudulent, they still might have found them to be breached -- especially since under California law a failure to perform a contractual promise is a breach, even though such a "failure to perform does not constitute fraud." *Church, supra*, 184 Cal.App.2d at 859. *See also* ER 257-58 (Pyramid's counsel's closing argument:

6/ For example, a contract claim does not require the "existence of an intent at the time of the making of the promise not to perform it" -- which intent is the "essence" of a fraud claim. *Church of Our Merciful Savior v. Volunteers of America*, 184 Cal.App.2d 851, 859 (1960) ("failure to perform [a promise] does not constitute fraud").

"there's no question Harvan said those things," *i.e.*, "that Pyramid would use its best effort to get up-to-date software"); ER 145 (Harvan Decl. ¶10; "Pyramid's failure to deliver on its commitment to provide these [software] applications thus deprived Nicole of its legitimate profits under the Marketing Agreement, and indeed drove Nicole out of business").[7/]

Under these circumstances, the district court and Ninth Circuit violated Nicole's due process rights by entering and then affirming a summary judgment order which prevented Nicole from trying its contract claim to the jury -- especially since the Ninth Circuit's ruling acknowledges that Nicole's evidence "shows, if anything, the possibility of an oral contract." Appendix "C" at pp. 14a-15a.

And if there was any confusion as to what claim was being alleged by Nicole, it should have been granted leave to amend its counterclaim. Indeed, Nicole did everything it could to correct the trial court's error before trial, including repeatedly trying to amend its counterclaim to clarify to the trial court that it was alleging a breach of contract claim.

For example, as early as its original opposition to Pyramid's summary judgment motion, Nicole said that "to the extent the Court may determine that any particular element of a joint venture agreement may not exist, Nicole asks leave to amend . . . its counterclaim to clarify that it is suing on the oral contract between the parties" (ER 66-67). Nicole also later formally moved to amend its counterclaim, to clarify that it was alleging a contract claim (ER 118-

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[7/] Nicole acknowledges that Pyramid's trial testimony and judicial admissions were not before the district court at the time it entered summary judgment, but the fact that Pyramid changed its story after cross-examination at trial shows why the factual disputes in this case should have prevented summary judgment from being entered at all.

20). *Accord,* ER 147-56 (copy of proposed amended counterclaim). *See* Nicole's Opening Brief on Appeal at pp. 16-18.

Pyramid argued on appeal that leave to amend was properly denied because "to allow Appellants to amend their counterclaim would have created a hardship and unduly prejudiced Pyramid by potentially reopening discovery and further complicating the issues to be litigated at trial." Pyramid's Brief on Appeal at p. 28. Pyramid's argument literally makes no sense. Nicole originally sought leave to amend its claim in February of 1994 (ER 66-67), before summary judgment was entered that April (ER 100); the ultimate discovery cutoff was not until a year later, in March of 1995 (ER 698); and trial did not occur until almost a year after that, in February of 1996 (ER 706-08). Pyramid never did -- and cannot -- explain how allowing Nicole's counterclaim to be amended in the spring of 1994 could affect a 1995 discovery cutoff or a 1996 trial.

It is settled that leave to amend "shall be freely given when justice so requires," (*Foman, supra,* 371 U.S. at 182), and "[i]f the underlying facts or circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits . . . ." *Vorachek, supra,* 563 F.2d at 886 (allowing complaint to be amended after summary judgment was already entered). *See also Bank, supra*, 928 F.2d at 1112 ("Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice"; reversing and remanding with instructions to grant leave to amend).[8/]

[8/] Pyramid urged that denying leave to amend was within the trial court's discretion (Pyramid's Brief on Appeal at p. 33), "but outright refusal to grant the leave without any justifying reason appearing for the denial is not an exercise of discretion: it is merely abuse of that discretion and is inconsistent with the Federal Rules." *Vorachek, supra*, 563 F.2d at 886.

Thus, by affirming the trial court's refusal to grant Nicole leave to amend its counterclaim even once to allege a contract claim -- despite Nicole's evidence which "shows, if anything, the possibility of an oral contract" (Appendix "C" at pp. 14a-15a) -- the Ninth Circuit adopted a rule which is squarely in conflict with these other Circuits' holdings. *See also In re Beef Indus. Antitrust Litigation*, *supra,* 600 F.2d 1148 (policy allowing pleadings to be amended is strongest on first motion to amend).

Moreover, the facts of this case dramatically show why it is wrong as a matter of policy to refuse to allow a claimant to amend its pleadings at least once, if "a more carefully drafted complaint might state a claim." 928 F.2d at 1112. Although Pyramid's summary judgment motion denied making any promises to Nicole (ER 52-53), Pyramid conceded after summary judgment was entered that "both [Pyramid's regional manager Jack] Harvan and [Harvan's supervisor Hugh] Flannery said, 'we're going to make our best effort to get software that's useful and competitive' " (ER 252; emphasis added). This was the very contractual promise alleged by Nicole (ER 41-42), and yet Nicole never had an opportunity to try its contract claim to the jury.

Nicole was substantially prejudiced by the trial court's and Ninth Circuit's refusal to allow it to allege a contract claim, since that claim never went to the jury despite Pyramid's subsequent admissions at trial that it actually made the very contractual promises which Nicole had alleged. This issue should be addressed on certiorari.

CONCLUSION

As detailed above, certiorari is appropriate to protect a party's rights to amend its pleadings, to resolve the conflict between Circuits on this issue, and generally to give guidance to federal courts in

dealing with motions for leave to amend. But this is a case where certiorari is also important to protect the constitutional rights of an individual, *i.e.*, petitioner Elliot Cook.

The dismissal of Nicole's contract claim is a miscarriage of justice and a blot on the U.S. judicial system. Not only does the evidence "show, if anything, the possibility of an oral contract" (Appendix "C" at pp. 14a-15a), but Pyramid specifically admitted at trial that it made each and every one of the contractual promises alleged by Nicole. *E.g.*, ER 252, 254. Yet Nicole was never allowed to try its contract claim to the jury.

Clearly, there was confusion below as to whether Nicole was alleging a contract claim or a joint venture claim. Whether this confusion arose from inartful pleading, or the district court's apparent failure to read the counterclaim, or some combination of both, or something else entirely, really makes no difference. Nicole repeatedly tried to amend its counterclaim to show that it was suing for breach of contract, and just as repeatedly it was slapped down -- even though the evidence "shows, if anything, the possibility of an oral contract." Appendix "C" at pp. 14a-15a.

It is basic law that summary adjudication "must be construed with due regard . . . for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury." *Celotex Corp., supra*, 477 U.S. at 327. The Ninth Circuit's ruling in this case violates this rule, and conflicts with the decision of every other Circuit which has addressed the issue. Certiorari is necessary to correct this injustice, and to resolve this conflict between Circuits.

For each of the above reasons, Nicole's petition for a writ of certiorari should be granted.

Dated: December 1998.

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APPENDIX "A"
TEXT OF TRIAL COURT'S
SUMMARY JUDGMENT ORDER

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PYRAMID TECHNOLOGY CORPORATION, INC.,	) No. C 91-20266 JW
Plaintiff,	) ORDER GRANTING
vs.	) PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
NICOLE'S INC., a Pennsylvania corporation, dba WHARTON AUTOMATION ASSOCIATES, ELLIOT COOK, an individual,	)
Defendants.	)
AND RELATED CROSS-ACTION.	)

Plaintiff and Counterdefendant Pyramid Technology Corporation, Inc. ("Pyramid") moves for summary judgment pursuant to Federal Rules of Civil Procedure, Rule 56(c) on Nicole Inc.'s Counterclaim. For the reasons set forth below, the Court hereby GRANTS Pyramid's Motion for Summary Judgment.

BACKGROUND

On May 25, 1989, Elliot Cook ("Cook") signed a Value Added Reseller ("VAR") Agreement with Pyramid. Cook is the sole shareholder, director, officer and general manager of Wharton Automation Associates ("Wharton"). Wharton is a fictitious business name for Nicole's Inc. Pursuant to the agreement, Cook was permitted to promote and sell Pyramid computer products. In this capacity, Cook sold a computer system to a law firm in Pennsylvania. Although Pyramid delivered the computer system directly to the law firm, and the firm paid Cook for the system, Cook never paid Pyramid the approximate $252,000 for the system.

On May 6, 1991, Pyramid filed this suit against Nicole's Inc., dba Wharton and Cook, in his individual capacity, to collect monies due from the sale of the computer system. Cook is named on the theory that Wharton was Cook's alter ego.[9/] On September 30, 1993, Nicole's Inc. filed a counterclaim against Pyramid alleging, among other things, that Nicole's Inc. and Pyramid entered into an oral contract for a joint venture, which Pyramid breached.

The counterclaim asserts the following six claims: (1) Breach of Contract (oral contract for joint venture); (2) Fraud and Deceit (falsely representing that Pyramid would comply with joint venture agreement); (3) Fraud and Deceit (fraudulently representing that Pyramid was committed to ensuring the availability of law firm software while concealing that Pyramid had no such commitment); (4) Negligent Misrepresentation; (5) Breach of the Implied Covenant of Good Faith and Fair Dealing; and (6) Quantum Meruit.

9/ In an order dated October 21, 1991, this Court denied Cook's motion to dismiss him in his individual capacity from this action.

Pyramid moves for summary judgment on the ground that Nicole's Inc. has presented no such evidence from which a joint venture between the parties may be implied.

DISCUSSION

1. Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and the moving part [sic] is entitled to judgment as matter of law. Fed.R.Civ.P. 56(c). To survive a motion for summary judgment, the non-moving party must show that the fact in contention is material and that it might affect the outcome of the suit under governing law. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248-49 (1986). Moreover, the non-moving party must demonstrate that the factual dispute is genuine, i.e. the evidence is such that a reasonable jury could not find for the moving party. Id.

2. Motion for Summary Judgment

"A joint venture is 'an undertaking by two or more persons jointly to carry out a single business enterprise for profit.'" Weiner v. Fleischman, 54 Cal.3d 476, 482 (1991). "The elements necessary for its creation are: (1) joint interest in a common business; (2) with an understanding to share profits and losses; and (3) a right to joint control." 580 Folsom Associates v. Prometheus Development Co., 223 Cal.App.3d 1, 15-16 (1990). Moreover, a joint venture may be formed orally, or "assumed to have been organized from a reasonable deduction from the acts and declarations of the parties.'" Weiner, 54 Cal.3d at 483 (citations omitted).

a. Evidence of Joint Venture

To support the existence of a joint venture agreement, Cook states the following: First, he began negotiating with Pyramid's regional sales manager Jack Harvan ("Harvan") during the summer of 1987 to work out an arrangement on behalf of Nicole's Inc. to market Pyramid computer products to large law firms. Cook Decl. ¶2. Second, as a result of these negotiations, Nicole's Inc. (through Cook) and Pyramid (through Harvan) agreed to enter a joint venture to market standardized computer software applications to large law firms. Cook claims that once the agreement was reached, he confirmed it in the fall of 1987 in a three-way telephone conversation with Harvan and Harvan's supervisor, Hugh Flannery. Cook Decl. ¶3.

Third, Cook claims he and Harvan agreed to the terms of the joint venture, which included the following: (1) both parties would target large law firms; (2) Pyramid would use its best effort to provide software applications for the legal market (such as WordPerfect) which would run on Pyramid Technologies; (3) Nicole's Inc. Would in turn use its best efforts to develop that market for Pyramid Technologies; and (4) both parties would utilize their best efforts to achieve high sales results. Cook Decl. ¶4.

Fourth, Cook claims that based on the joint venture agreement, Nicole's Inc. spent the next three years using most of its time, effort, and funds developing a market among large law firms for Pyramid Technologies. Cook Decl. ¶6. Moreover, he claims Nicole's Inc. devoted substantial time and employee resources in an effort to acquire Pyramid Technologies. Id.

Finally, Cook claims that Pyramid breached the joint venture agreement by failing to deliver the computer software applications which it promised after Nicole's Inc. successfully obtained the agreed market. Cook Decl. ¶7.

b. Evidence which contradicts the existence of a Joint Venture

On the other hand, Pyramid offers the following evidence to contradict the existence of a joint venture agreement: First, Flannery was not authorized to enter into any agreements on Pyramid's behalf and never discussed entering into a joint venture with Nicole's Inc. Hugh Flannery Decl. ¶¶2, 5. Second, Pyramid does not manufacture "computer software applications." By the end of 1990, Pyramid made a business decision to enter into a licensing agreement with WordPerfect and paid WordPerfect several hundred thousand dollars for the license.[10/] Allan D. Smirni Decl. ¶11.

Third, Defendants were essentially Pyramid's customer under the May 25, 1989 VAR agreement, which allowed Cook to buy Pyramid equipment and add value to it when Cook sold it to his own customers. In addition to the VAR agreement, Pyramid executed the following agreements with Nicole's Inc., through Cook: (1) A Software Binaries License Agreement dated April 26, 1988. Allan D. Smirni Decl., Ex. F; (2) U.S. Purchase Agreement dated April 26, 1988. Id., Ex. G; (3) Software Binaries License Agreement dated June 29, 1990. Id., Ex. J; and (4) a U.S. Purchase Agreement dated June 29, 1990. Id., Ex. I.

Finally, in a memorandum ("memo") dated October 10, 1990, Cook discusses the relationship between Nicole's Inc. and Pyramid and explains why the Defendants withheld payment for the computer system. Allan D. Smirni Decl., Ex. B. The memo fails to mention an oral joint venture agreement and does not state that a breach of the joint venture agreement is the basis for withholding payment.

After having reviewed the evidence, the Court finds that there

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10/ Nicole's Inc.'s objection to this evidence is overruled.

is no material factual disputes [sic] with respect to the nature of the business relationship between Nicole's Inc. and Pyramid. There is insufficient evidence to support Nicole's Inc.'s claim that a joint venture was formed, primarily because essential elements of a joint venture are totally missing. Nicole's Inc. has not presented any evidence to suggest that the parties' relationship was anything other than that formalized in the various agreements Pyramid and Nicole's Inc. entered into between 1988 and 1990. See Okura & Co. (America), Inc. v. Careau Group, 783 F.Supp. 482 (C.D. Cal. 1991).

Nicole's Inc. claims that it may still maintain claims for fraud and deceit, negligent misrepresentation and quantum meruit even if the Court finds that the oral contract is not enforceable. While this may be the law, the Court has made a determination that no joint venture existed, not that the agreement is unenforceable. Under these circumstances therefore, Nicole's Inc.'s other claims must fail as well since the remaining claims all hinge on the existence of a joint venture agreement.

Accordingly, Pyramid's motion for summary judgment on Nicole's Inc.'s counterclaim is hereby GRANTED.

The current pretrial and trial dates are hereby vacated. The parties are directed to appear for a preliminary pretrial conference on April 29, 1994 at 10:30 a.m.

IT IS SO ORDERED.

DATED: April 15, 1994

James Ware /s/
HONORABLE JAMES WARE
United States District Judge

APPENDIX "B"
TEXT OF TRIAL COURT ORDER
DENYING LEAVE TO AMEND

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

PYRAMID TECHNOLOGY CORPORATION, INC.,	No. C 91-20266 JW
Plaintiff,	ORDER DENYING DEFENDANT'S MOTION FOR RECONSIDERATION TO VACATE SUMMARY JUDGMENT, FOR LEAVE TO AMEND, AND TO CERTIFY FOR IMMEDIATE APPEAL
vs.	
NICOLES, INC., a Pennsylvania corporation, dba WHARTON AUTOMATION ASSOCIATES, and ELLIOT COOK, an individual,	
Defendants.	
AND RELATED CROSS-ACTION.	

Defendant Nicole's Inc. ("Nicole's") moves in the alternative for (1) reconsideration of this Court's April 15, 1994 Order granting Plaintiff's motion for summary judgment; (2) to vacate summary judgment and permit oral argument on Plaintiff's motion for summary judgment; (3) leave to file an amended counterclaim; and (4)

certification of this Court's April 15, 1994 Order granting Plaintiff's motion for summary judgment for immediate appeal.

BACKGROUND

On April 15, 1994 the Court granted Plaintiff's motion for summary judgment on Defendant's counterclaim because there was insufficient evidence to establish that an oral contract for a joint venture was formed between Nicole's and Pyramid Technology Corporation, Inc. ("Pyramid").[1/] The Court found that the essential elements of a joint venture were missing. After review and consideration of the papers submitted, the Court finds that Nicole's has failed to offer new evidence or present any authority invalidating the April 15, 1994 Order granting Pyramid's motion for summary judgment. Accordingly, for the reasons set forth below, the Court hereby DENIES Nicole's alternative motions for reconsideration, leave to amend, and certification for immediate appeal. Moreover, Pyramid's motions to strike the declarations of Jack Harvan and Elliot Cook are hereby DENIED.

DISCUSSION

1. Motion for Reconsideration

Nicole's motion for reconsideration fails to set forth any additional information or evidence which demonstrates that summary judgment should have been denied. A party moving for reconsideration must show more than a disagreement with the Court's decision. In Re Worlds of Wonder Sec. Litig., 814 F.Supp. 850, 874 (N.D. Cal. 1993). Reconsideration is appropriate only where there is a need to correct a clear error of law or to prevent a manifest injustice. Id.

1/ The parties are referred to the Court's Order of April 15, 1994.

Nicole's motion relies primarily upon the declaration of Jack Harvan, a former Pyramid executive, to show that there exists a genuine issue of material fact as to whether the parties entered into a joint venture. However the Harvan declaration merely confirms the facts set forth in the declaration of Elliot Cook. (Harvan Decl. §4). The Court found these facts, as reported in the Cook declaration, insufficient to establish a joint venture under California law. Since Nicole's has failed to present new facts which support existence of a joint venture, reconsideration is inappropriate. A motion for reconsideration is not the proper vehicle for revisiting cases and arguments which were reviewed by the Court before rendering its original decision. Worlds of Wonder, 814 F.Supp. at 874. Nicole's has failed to show a clear error of law or the need to correct a manifest injustice. Accordingly, Nicole's motion for reconsideration is DENIED.

2. Motion to Vacate Summary Judgment

Nicole's motion to vacate the summary judgment Order of April 15, 1994 and to allow oral argument on Pyramid's motion for summary judgment fails to set forth any reasons why oral argument would affect the outcome of Pyramid's motion for summary judgment. In the absence of any new evidence demonstrating a joint venture, Nicole's request for oral argument is essentially a motion for reconsideration which has already been denied for the reasons set forth above.

Nicole's correctly relies upon Dredge Corp. v. Penny, 338 F.2d 456 (9th Cir. 1964), for the proposition that a District Court may not deny a request for oral argument when made by a party opposing a motion for summary judgment unless the motion is denied. However, Nicole's made no such request for oral argument on Plaintiff's motion for summary judgment. Moreover, Local Rule 220-1 provides that motions may be determined, in the Court's discretion,

without oral argument. Accordingly, Nicole's motion to vacate the Court's April 15, 1994 Order, and allow oral argument is DENIED.

3. Motion for Leave to File an Amended Counterclaim

Nicole's has not demonstrated that filing an amended counterclaim at this time would change the result in this matter. The proposed amendment to substitute "oral contract" for "joint venture" in the pleadings does not involve a newly recognized legal theory, nor is it based upon newly discovered facts. The Court has already considered Nicole's claim that an oral contract was formed between Nicole's and Pyramid. The Court found that there was insufficient evidence to support a finding that such an agreement took place.[12/] Nicole's motion is a request for reconsideration in yet another form. As stated above, the Court has denied the motion to reconsider the Order of April 15, 1994.

Moreover, Nicole's proposed amendment is futile. The Court has already found that there is insufficient evidence to support a finding that there was an oral agreement between the parties. Nicole's proposed amendment would result in undue delay in the resolution of this action. Accordingly, the motion for leave to amend is DENIED.

4. Motion to Certify for Immediate Appeal

Nicole's motion to certify for immediate appeal fails to meet the standards of Federal Rule of Civil Procedure 54(b) or 28 U.S.C. §1292(b). An immediate appeal would not be appropriate in this instance because there is no controlling question of law.

The Court has discretion to certify an order for interlocutory appeal under 28 U.S.C. §1292(b) only if all of the three following

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12/ The parties are referred to the Court's Order of April 15, 1994.

criteria are met: (1) the order involves a controlling question of law; (2) upon which there is substantial grounds for difference of opinion; and (3) an immediate appeal may materially advance the ultimate termination of the litigation. Kern-Tulare Water Dist. v. City of Bakersfield, 634 F.Supp. 656, 666 (E.D. Cal. 1986). The Court's April 15, 1994 Order granting summary judgment was based upon a factual determination as to the business relationship between Nicole's and Pyramid. Therefore, since at least one of the required factors has not been established, the Court need not consider whether an immediate appeal would advance the ultimate determination of the litigation.

Federal Rule of Civil Procedure 54(b) permits the entry of final judgment upon a determination that there is no just reason for delay. Continental Airlines, Inc. v. Goodyear Tire & Rubber Co., 819 F.2d 1519, 1525 (9th Cir. 1987). Nicole's has not demonstrated that they will suffer prejudice if their appeal is delayed until a final judgment is entered. Therefore, the Court finds that certification under Rule 54(b) would not be appropriate in this case. Accordingly, Nicole's motion to certify for immediate appeal is DENIED.

CONCLUSION

The Court hereby orders the following:

1. Defendant's motion for reconsideration of this Court's April 15, 1994 Order granting Plaintiff's motion for summary judgment is DENIED.

2. Defendant's motion to vacate the Order of April 15, 1994 and allow oral argument on Plaintiff's motion for summary judgment is DENIED.

3. Defendant's motion for leave to file an amended counterclaim pursuant to Federal Rule of Civil Procedure 15(a) is

DENIED.

4. Defendant's motion to certify the summary judgment Order of April 15, 1994 for immediate appeal pursuant to Federal Rule of Civil Procedure 54(b) or 28 U.S.C. §1292(b) is DENIED.

5. The final pre-trial conference will be on November 3, 1994 at 2:00 p.m. The parties are to be governed by the Standing Order for Civil Cases regarding the submission of pre-trial material.

8. Jury selection will be on November 14, 1994 at 9:00 a.m.

IT IS SO ORDERED.

DATED: July 11, 1994

James Ware /s/
JAMES WARE
United States District Judge

APPENDIX "C"
TEXT OF NINTH CIRCUIT RULING

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PYRAMID TECHNOLOGY CORPORATION, INC., Plaintiff-Counter-Defendant-Appellee, vs. NICOLES, INC., a Pennsylvania corporation dba Wharton Automation Associates; ELLIOT COOK, Defendant-Counter-Claimants-Appellants.	Nos. 96-17152 96-17368 D.C. No. CV 91-20266-JW MEMORANDUM*/

Appeal from the United States District Court
for the Northern District of California
William A. Ingram, Chief District Judge, Presiding

Argued and Submitted February 12, 1998
San Francisco, California

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*/ This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided in 9th Cir. R. 36-3.

Before: D.W. NELSON, REINHARDT and WIGGINS, Circuit Judges.

Nicole's, Inc. ("Nicole") and Elliot Cook, its sole shareholder and managing director, appeal several rulings in the district court against them and in favor of Pyramid Technology Corporation ("Pyramid"). We have jurisdiction under 28 U.S.C. § 1291. We affirm the summary judgment against Nicole on its original counterclaims and the judgments against Nicole and Cook on Pyramid's claims and Nicole's amended counterclaims. We affirm the award of attorneys' fees and costs in part and reverse in part and remand to the district court to determine the appropriate reduction and to reduce the award accordingly.

I. Summary Judgment on Original Counterclaims

Nicole appeals the district court's summary judgment against it on its original counterclaims. Nicole argues it alleged an oral contract rather than an oral joint venture agreement and that it produced sufficient evidence for trial. We review a district court's grant of summary judgment de novo. See Bagdadi v. Nazar, 84 F.3d 1194, 1197 (9th Cir. 1996). We agree with the district court that Nicole alleged a joint venture agreement in its counterclaims against Pyramid and that Nicole failed to produce sufficient evidence to show a genuine issue for trial as to whether Pyramid and Nicole had a joint venture agreement.

First, Nicole clearly pled a joint venture agreement by the language of its counterclaims. Second, Nicole did not produce evidence of a joint venture agreement. Nicole relies in particular on Jack Harvan's declaration. That declaration, however, only shows, if

anything, the possibility of an oral contract, not an oral joint venture agreement. Moreover, the existence of a joint venture agreement is contradicted firmly by other evidence. Pyramid and Nicole entered into five written agreements after the alleged oral joint venture agreement. These written agreements show that Nicole was Pyramid's customer, rather than a joint venturer. In addition, in an October 1990 memorandum to Allan Smirni, Pyramid's Vice President, Cook detailed the history of Nicole and Pyramid's business relationship. He characterized the discussions in 1987 only as their "initial contact" and his work with law firms as providing Pyramid with "a free done deal," undermining Nicole's claim that the work was done in exchange for valuable consideration as part of a joint venture. The mere fact that Cook later alleged those discussions to be more substantive is insufficient to show a genuine issue of material fact on Nicole's counterclaim.

Nicole likewise failed to present sufficient evidence to show a dispute of material fact on its negligent misrepresentation and quantum meruit claims, both of which relied on the existence of the joint venture contract. The district court did not err in granting Pyramid summary judgment on these counterclaims.

Nicole argues that the district court erred by granting Pyramid summary judgment without oral argument. The local rules of the district court stated that the judge may, in his discretion, decide summary judgment motions without oral argument. Nicole only asked for oral argument after the district court had already granted Pyramid summary judgment. The district court, therefore, did not abuse its discretion and Nicole in effect waived its right to oral argument. See Dredge Corp. v. Penny, 338 F.2d 456, 461-62 (9th Cir. 1964) (party waives any right to oral argument on summary judgment motion by failing to apply for it).

The district court properly granted Pyramid summary judgment on Nicole's original counterclaims.

II. Request for New Trial

Nicole requests a new trial on the basis that the district court erroneously allowed expert testimony that exceeded the scope of the expert's pretrial report. We review a district court's decision to admit expert opinion testimony for an abuse of discretion. See United States v. Webb, 115 F.3d 711, 713 (9th Cir.), cert. denied, 118 S. Ct. 429 (1997).

The pretrial report was required to disclose "all opinions to be expressed." Fed. R. Civ. Pro. 26(a)(2)(B). We agree with the district court that the challenged question was not a surprise. The pretrial report listed a large number of gaps and discrepancies in Nicole's business records and a large number of cash disbursements made "without any supporting documentation as to their nature or business purpose." The question asked for an opinion on whether certain monies were used for legitimate business expenses. The report had suggested that Nicole used monies for improper purposes and had thereby put Nicole on notice of this question. The district court did not abuse its discretion. We deny Nicole's request for a new trial on the basis of erroneously-admitted expert testimony.

Nicole also argues that a new trial is necessary because the jury did not follow its instructions. The district court denied Nicole's motion for a new trial on this basis. We review its denial of the new trial motion for an abuse of discretion. See EEOC v. Pape Lift, Inc., 115 F.3d 676, 680 (9th Cir. 1997). Nicole alleges that four jurors stated to Nicole's attorneys after the trial that "the jury believed that Mr. Cook did not lie to Pyramid" and that, therefore, the jury's verdict

of fraud was inconsistent and mandates a new trial. That juror statement, even if true, fails to show that the jurors did not follow their instructions or that their verdict of fraud was inconsistent. The district court did not abuse its discretion.

III. Appellant Cook

Cook argues that the judgment against him should be reversed in its entirety because Pyramid failed to produce any evidence going to one element of its claim that Nicole was his alter ego.

The district court gave two different sets of instructions to the jury on the question of alter ego. The first set of instructions had three elements. The second set of instructions on alter ego immediately followed the first. This second set omitted the third element of the first set of instructions. The court again reiterated this two-element test while summarizing the alter ego claim.

The third element of the first set of instructions -- fraudulent incorporation -- was an incorrect statement of law. See Automotriz v. Resnick, 47 Cal. 2d 792, 796 (Cal. 1957). An error in jury instructions in a civil case does not mandate reversal if the error is more probably than not harmless. See Caballero v. City of Concord, 956 F.2d 206 (9th Cir. 1992). Cook was clearly not harmed by the inclusion of an erroneous instruction that, if anything, made it more difficult for the jury to find against him. The district court twice stated the correct instruction. Cook is not entitled to a reversal as a matter of law.

IV. Appeal of Fees and Costs Award

Pyramid argues that Nicole's and Cook's appeal of the district court's award of attorneys' fees and costs is untimely. Pyramid's

argument fails. Nicole and Cook have produced evidence showing that their appeal did in fact arrive in the clerk's office on the day it was due. The appeal is timely.

Nicole and Cook appeal the district court's award of attorneys' fees and costs. We review this award for abuse of discretion. See Wing v. Asarco Inc., 115 F.3d 986, 988 (9th Cir. 1997). "A district court abuses its discretion if it does not apply the correct law or if it rests its decision on a clearly erroneous finding of material fact." Marchand v. Mercy Med. Ctr., 22 F.3d 933, 936 (9th Cir. 1994). The district court did err as a matter of law by awarding Pyramid its fees and costs for defending against Nicole's original counterclaims and for its adversary action in Nicole's bankruptcy proceeding. The remainder of the award was not an abuse of discretion.

The district court erred as a matter of law by granting Pyramid its attorneys' fees and costs for defending against Nicole's original counterclaims. Pyramid relied on the fees and costs provision in Nicole and Pyramid's 1989 VAR Agreement. The VAR Agreement awarded reasonable attorneys' fees and costs to the prevailing party in a proceeding to resolve "any dispute pertaining to matters covered by this Agreement [that] arises between the parties."

Nicole's original counterclaims were based solely on the existence of a 1987 joint venture agreement, not on the 1989 VAR Agreement. The alleged joint venture agreement and the VAR Agreement containing the fee provision are clearly not the same agreement. The counterclaims, moreover, did not adopt the terms of the VAR Agreement. Unlike in Xuereb v. Marcus & Millichap, Inc., 3 Cal. App. 4th 1338 (Cal. Ct. App. 1992), Nicole's original counterclaims arose independent of the VAR Agreement. Pyramid could not, therefore, obtain fees and costs for defending against these

original counterclaims.

The amount of fees and costs incurred by Pyramid in defending against the original counterclaims is not clear from the record. Accordingly, we remand to the district court for a determination of this amount and an appropriate reduction in the total award.

The district court also erred in granting Pyramid its fees and costs for its adversary action in Nicole's bankruptcy proceedings. That action was not part of this proceeding. We reverse the district court's award of Pyramid's fees and costs for the bankruptcy action and again remand to the district court for a determination and reduction of the amount.

In contrast, the district court did not err in granting Pyramid its attorneys' fees and costs for defending against Nicole's amended counterclaims. Those counterclaims were explicitly based on the VAR Agreement and Pyramid prevailed.

Similarly, the district court did not abuse its discretion by awarding fees and costs to Pyramid for its indemnity action against Harvan. Pyramid sought indemnity from liability for Nicole's amended counterclaims. These counterclaims were clearly and explicitly based on the VAR Agreement. The indemnity action was part of the same "proceeding" covered by the fee provision. Therefore, the indemnity claim as well as the amended counterclaims fall within the fee provision's coverage.

Cook argues that he cannot be personally liable for attorneys' fees and costs because he was not a party as an individual to the VAR Agreement and because the jury did not make a finding that Nicole

was his alter ego regarding attorneys' fees. This argument fails. The jury found that Nicole was Cook's alter ego and thus "pierced the veil" of the corporation, making Cook liable for the actions of Nicole under the VAR Agreement. The award of fees and costs against Cook was not an abuse of discretion.

Appellants appeal a number of other fees and costs awarded by the district court: Hugh Flannery's consulting time fee, Ed Scott's travel expenses, the summons' cost, the cost of a Cook deposition, and other miscellaneous expenses. Appellants have failed to show that any of these costs is an abuse of discretion.

V. Conclusion

For the foregoing reasons, we AFFIRM the summary judgment on Nicole's original counterclaims, AFFIRM the district court's judgment on Pyramid's claims, REVERSE-IN-PART and AFFIRM-IN-PART the district court's award of attorneys' fees and costs, and REMAND to the district court to determine he appropriate reduction of the award and to reduce the award accordingly.

AFFIRMED-IN-PART, REVERSED-IN-PART, AND REMANDED.

APPENDIX "D"
TEXT OF NINTH CIRCUIT REHEARING ORDER

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PYRAMID TECHNOLOGY CORPORATION, Plaintiff-Counter-Defendant-Appellee, vs. NICOLES, INC., a Pennsylvania corporation, dba Wharton Automation Associates; ELLIOTT COOK, Defendant-Counter-claimants-Appellants.	Nos. 96-17152 96-17368 D.C. No. CV 91-20266-JW ORDER AMENDING MEMORANDUM AND DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Before: D.W. NELSON, REINHARDT and WIGGINS, Circuit Judges.

The memorandum filed on July 27, 1998, is amended as follows:

In paragraph V on page 9, add the following sentence. "Costs are awarded to Pyramid Technology Corporation, Inc."

With this amendment, the panel has voted unanimously to deny the petition for rehearing. Judge Reinhardt votes to reject the suggestion for rehearing en banc and Judges D.W. Nelson and Wiggins so recommend.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. 35.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

CERTIFICATE OF SERVICE

I certify that on Wednesday, December 2, 1998, I served three copies of the Petition for a Writ of Certiorari to the United States Court of Appeal for the Ninth Circuit on all parties required to be served, by depositing such copies in the United States mail, postage prepaid, in envelopes addressed to each of the following:

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